Supreme Court, U.S.
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No. 09-93

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM S. ANAPOELL, M.D.,

Petitioner,

v.

AMERICAN EXPRESS BUSINESS FINANCE CORP., KEY EQUIPMENT FINANCE, INC.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In view of this Court's holding in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), did the Tenth Circuit err in affirming dismissal of contract claims under FED. R. CIV. P. 12(b)(6) for failure to state a claim upon which relief may be granted when the operative pleading contained significant factual detail concerning the manners of breach?

2. Did the Tenth Circuit err in affirming the district court's finding that the plain language of an equipment lease requiring lessor to charge lessees for the "expense" of "obtain[ing] insurance" coverage for the leased equipment permitted lessor to charge sums in excess of its actual expense?

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PETITION FOR WRIT OF CERTIORARI

Petitioner William S. Anapoell, M.D., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

DECISIONS BELOW

The District of Utah granted a motion to dismiss for failure to state a claim upon which relief may be granted. The corresponding unpublished decision appears at page 11 in Petitioner's appendix. The Tenth Circuit affirmed the district court at 2009 U.S. App. Lexis 6315 and subsequently denied a petition for rehearing. The orders of the Tenth Circuit appear in Petitioner's appendix at pages 1 and 26, respectively.

STATEMENT OF JURISDICTION

The order and judgment to be reviewed was entered on March 24, 2009. The Court of Appeals entered an order denying a petition for rehearing *en banc* on April 22, 2009. This Court's jurisdiction is proper under 28 U.S.C. § 1254(1).

RELEVANT ENACTMENTS

FED. R. CIV. P. 8(a): A pleading that states a claim for relief must contain: ...(2) a short and plain statement of the claim showing that the pleader is entitled to relief....

FED. R. CIV. P. 12(b): Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion: ...(6) failure to state a claim upon which relief may be granted....

STATEMENT OF THE CASE

This case presents the Court with an opportunity to clarify the operation of the pleading sufficiency standard announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Petitioner and plaintiff Dr. William S. Anapoell ("Dr. Anapoell") practices medicine in San Diego, California. Like many health care providers, Dr. Anapoell furnishes his practice with leased medical equipment. In February 2004, he entered a lease with defendant American Express Business Finance Corporation ("AEBF") for the rental of medical equipment at $2,598.93 per month for five years. App. 32, ¶¶ 18-19. Later in 2004, Key Equipment Finance, Inc. ("Key") acquired AEBF's equipment leasing portfolio. App. 30, ¶ 10.

Due to the high cost of most medical machinery, Dr. Anapoell's form lease includes provisions relating to insurance coverage for the equipment. Under the lease, Dr. Anapoell could either procure his own insurance policy or allow AEBF and Key (collectively, "Defendants") to obtain insurance. App. 42, ¶ 8. The equipment lease expressly provides: "In the event that Lessor determines that [lessee's own] insurance is not in effect, Lessor may (but shall not be required to) obtain such insurance at Lessee's expense." *Id.*

Pursuant to this provision, Dr. Anapoell permitted Defendants to obtain insurance coverage and agreed to pay the expense. App. 32, ¶¶ 20-24. Defendants then issued invoices to Dr. Anapoell which included two charges for insurance: $157.35 for "property insurance" and $90.48 for "liability insurance." App. 32, ¶ 24. The charges totaled $247.83 per monthly invoice. *Id.*

The $247.83 monthly charges exceeded the expense of obtaining insurance to cover Dr. Anapoell's medical

equipment. App. 32-33, ¶ 24. The charges included amounts in excess of the true insurance premium and the reasonable expenses to obtain the insurance. *Id.* Defendants inflated the insurance charges in several ways, which Dr. Anapoell described in his second amended complaint ("S.A.C."). *Id.*

First, the charges included a "billing and collecting" component although Defendants incur no corresponding cost. App. 32-33, ¶ 24. Second, Defendants also inflated the amounts by charging Dr. Anapoell interest for financing the insurance premiums at rates in excess of the costs of actual funds advanced. *Id.* Third, the insurance charges did not take account of payments Defendants received from insurers under the guise of rebates, reinsurance cessations, service fees, and commissions. *Id.*

Dr. Anapoell initially paid the inflated insurance charges, not knowing that they exceeded the expense of obtaining coverage. App. 33, ¶ 25. After complaints to Defendants proved futile, Dr. Anapoell brought this action, alleging that Defendants charged him amounts well in excess of the expense to obtain insurance and unrelated to the procurement of coverage, in direct breach of the lease. App. 35-36, ¶¶ 30-35. He further alleges that Defendants broke the implied covenant of good faith and fair dealing by failing to ascertain the real expense of obtaining insurance and instead charging inflated amounts. App. 36-37, ¶¶ 36-41.

The District of Utah held jurisdiction over this matter pursuant to the Class Action Fairness Act of 2005, as codified at 28 U.S.C. § 1332(d), inasmuch as there are at least 100 members in each of the proposed plaintiff classes, and the combined claims in each class exceed $5 million, exclusive of interest and costs. App. 29, ¶¶ 4-6. The requirement of minimal diversity is met insofar as Dr.

Anapoell is a California citizen, AEBF is a Utah citizen, and Key is a Michigan citizen. App. 29, ¶ 7.

The district court dismissed Dr. Anapoell's second amended complaint, with prejudice, finding that he failed to state facts sufficient to support his claims. App. 11. The Tenth Circuit issued a summary affirmation (App. 1), holding only that "we affirm the district court's order for substantially the reasons contained in that order," and later denied a petition for rehearing. App. 26.

REASONS TO GRANT THE PETITION

I. The Tenth Circuit Applied Pleading Rules in a Manner Conflicting with Relevant Precedent of This Court.

This Court recently reinterpreted federal pleading rules in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-556 (2007), holding that to state a claim for relief, a pleading must alleged sufficient factual matter to render the claim plausible on its face.

Since the *Twombly* ruling, considerable confusion has arisen concerning the application of the new standard. *See, e.g.*, Anthony Martinez, *Plausibility Among the Circuits: An Empirical Survey of Bell Atlantic Corp. v. Twombly*, 61 Ark. L. Rev. 763 (2009). The Court appears to have recognized as much in its recent decision reversing the Second Circuit's interpretation of *Twombly* in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

In this case, the district court and the Tenth Circuit have applied the federal pleading rules in a fashion much more stringent than contemplated by this Court in *Twombly* or in subsequent Supreme Court opinions on the subject. A grant of certiorari is particularly appropriate where, as here, a United States court of appeals has decided an important question of federal law in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10.

A. A Short and Plain Statement of a Claim's Factual Basis Is Sufficient to Survive a Rule 12(b)(6) Motion to Dismiss.

Even after *Twombly*, a complaint need only furnish "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the...claim is and the grounds upon

which it rests." FED. R. CIV. P. 8(a)(2); *Twombly*, 550 U.S. at 55.

In the *Twombly* decision, this Court interpreted the Rule 8 standard in the context of a motion to dismiss under Rule 12(b)(6), explaining that "a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 55 (internal citations omitted). Rather, to survive a motion to dismiss, a complaint must state enough factual matter to "raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.*; *Ashcroft*, 129 S. Ct. at 1949 ("the plausibility standard is not akin to a 'probability requirement'").

Prior to *Twombly*, federal courts would not dismiss for failure to state a claim unless it appeared that the plaintiff could prove "no set of facts" which would entitle him or her to relief. *See Twombly*, 550 U.S. at 561-562. Although the *Twombly* decision represented a tightening of the standard, this Court was careful to emphasize that, even under the clarified rule, "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations" (*id.* at 555), nor does such a complaint require "heightened fact pleading of specifics." *Id.* at 570. Rather, the Court described its *Twombly* holding as requiring only "some factual context" suggesting a plausible claim, as opposed to mere "labels and conclusions" or "formulaic recitation." *Id.* at 549, 555; *Ashcroft*, 129 S. Ct. at 1949.

B. The Tenth Circuit Held Dr. Anapoell to an Extraordinary Standard.

In contravention of rulings of this Court, the decision of the Tenth Circuit effectively holds Dr. Anapoell to an

erroneously heightened standard of pleading specificity. Dr. Anapoell stated his claims for breach of contract and breach of the implied covenant of good faith and fair dealing with considerable factual detail going beyond that required by law, yet the Tenth Circuit affirmed dismissal of his claims for want of even more.

In fact, this Court has already had occasion to correct an overly harsh application of *Twombly* by the Tenth Circuit. In *Erickson v. Pardus*, 551 U.S. 89, 90 (2007), the Supreme Court criticized a Tenth Circuit holding for "depart[ing] in so stark a manner from the pleading standard mandated by the Federal Rules of Civil Procedure." There, the Tenth Circuit affirmed the dismissal of a sick prisoner's Eighth Amendment claim in relation to the termination of a hepatitis treatment program, calling the prisoner's allegations of harm conclusory. *Id.* at 92.

This Court vacated the dismissal on the grounds that the prisoner's allegations of withheld medication were more than sufficient to satisfy Rule 8(a)(2). *Erickson*, 551 U.S. at 94. The Court noted that the federal rules' "liberal pleading standards" remain in effect, even in *Twombly's* wake. *Id.*

1. Dr. Anapoell Sufficiently Stated His Claim for Breach of Contract.

The equipment lease requires that Dr. Anapoell either insure the leased medical equipment or allow Defendants to procure coverage. App. 42, ¶ 8. Dr. Anapoell exercised his right under the equipment lease to allow Defendants to "obtain such insurance at Lessee's expense." *Id.* Defendants then breached this lease provision by repeatedly charging Dr. Anapoell inflated amounts in excess of and unrelated to the "expense" of "obtain[ing] such

insurance."[1] In the S.A.C., Dr. Anapoell specifically described several different ways in which Defendants overstated the purported "expense." App. 32-33, ¶ 24; App. 36, ¶ 33.

Dr. Anapoell's contract claim goes far beyond mere "labels and conclusions" and is by no means a "formulaic recitation of the elements." *Twombly*, 550 U.S. at 555. Rather, the S.A.C. states a claim for breach of the insurance provision with multiple, specific, supporting factual averments. In several ways, Dr. Anapoell described how Defendants' monthly insurance charges greatly exceeded the expense of obtaining insurance to cover the leased equipment. App. 31, ¶ 16; App. 32-33, ¶ 24; App. 36, ¶ 33. His allegations made clear that the excess portion of the charges in fact bore no connection to actual expenses, but constituted pure windfall.

For example, the S.A.C. states as follows at paragraph 24:

> Defendants sent standardized form invoices to Anapoell that included two charges for insurance, in the amounts of $157.35 for property insurance and $90.48 for liability insurance, for a total of $247.83 per month. The charges were far more than Defendants' expense to obtain insurance coverage, in breach of the Agreement. App. 32-33, ¶ 24

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[1] In Utah, the elements of a claim for breach of contract are: (1) a contract, (2) performance by the party seeking recovery, (3) breach of the contract by the other party, and (4) damages. *Bair v. Axiom Design, L.L.C.*, 20 P.3d 388, 392 (Utah 2001). Only the sufficiency of Dr. Anapoell's allegations with respect to the third element, breach by Defendants, is at issue here.

Paragraph 24 goes on to specifically describe the methods by which Defendants overcharged Dr. Anapoell:

> [The] charges include amounts over the true insurance premium plus reasonable expenses to obtain that insurance in that the monthly insurance charge includes a "billing and collecting" fee (with no corresponding cost to Defendants) and/or undisclosed interest at grossly excessive rates for Defendants' "financing" of the premium (with rates will over the cost of any actual funds advanced); and/or in that the monthly charge includes amounts over the true insurance premium and reasonable expenses to obtain that insurance because Defendants (or their alter ego affiliates) receive payments from insurance agents or insurance companies under the guise of reinsurance cessations, service fees, commissions or rebates with no corresponding costs or risk. App. 32-33, ¶ 24

At paragraph 33, the S.A.C. further alleges that,

> In reality the insurance charge is simply a disguised profit center designed to collect additional monies from Plaintiffs that they have not agreed to pay. When Plaintiffs contracted with

> Defendants they agreed to pay for a monthly lease charge in a set amount. They also agreed to pay for the expense of obtaining liability and property insurance coverage. The amount charged for insurance by Defendants is not for the expense of obtaining liability and property insurance coverage as mandated by the contract and therefore by assessing the charge for a purpose not agreed to, Defendants are in breach. App. 36, ¶ 33

In elaborating the factual bases for the breach of contract claim, Dr. Anapoell described how Defendants padded the insurance charges with extra amounts for billing and collection which were inflated over the real costs for billing and collecting the insurance charges. App. 31, ¶ 16; App. 32-33, ¶ 24. He also alleged that the insurance charges included amounts charged as interest for Defendants' proposed "financing" of the premiums it paid to insure equipment. *Id.* The S.A.C. alleged that the interest component of the insurance charge reflected interest rates "well over the cost of any actual funds advanced." *Id.*

The S.A.C. went further in describing the contract claim's factual basis. Beyond the charges' billing, collection, and insurance components, Dr. Anapoell explained that the insurance charges did not reflect the real expense of obtaining insurance because Defendants received covert discounts and rebates from insurers, the amounts of which were not reflected in the charges billed to Dr. Anapoell. App. 31, ¶ 16; App. 32-33, ¶ 24. The S.A.C.

described how these payments took the form of reinsurance cessations, service fees, and commissions which carried no corresponding costs or risks. *Id.*

To elaborate further on Defendants' breach of the equipment lease, Dr. Anapoell alleged in paragraph 33 of the S.A.C. that the insurance charges were "far in excess of and unrelated to [Defendants'] expense of obtaining insurance," rendering the charges a "disguised profit center designed to collect additional monies from Plaintiffs that they have not agreed to pay." App. 36, ¶ 33.

None of these allegations is conclusory in nature. An allegation is conclusory only if it amounts to a legal conclusion lacking any supporting factual averments. *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (allegation is conclusory if it constitutes a "legal conclusion couched a factual allegation"); *Brown v. Zavaras*, 63 F.3d 967, 972 (10th Cir. 1995) (a claim is conclusory if it lacks allegation of "factual basis"). That is not the case here, where Dr. Anapoell spelled out multiple factual descriptions of the several methods by which Defendants inflated the insurance charges.

Perhaps it would have been conclusory for Dr. Anapoell to allege merely that Defendants breached the expense provision, with nothing more. Such an allegation would constitute a bald legal conclusion with no supporting factual averments.

However, Dr. Anapoell went well beyond mere legal conclusions. In fact, he far surpassed the *Twombly* standard, specifying several tiers of supporting fact beyond a mere allegation that Defendants breached the lease. First, he identified *what* conduct of Defendants constituted the breach: Defendants' practice of billing him for inflated insurance charges. App. 36, ¶ 33. Going beyond this basic factual underpinning, he further specified *when* this

practice took place: after entering his lease in February 2004. App. 32, ¶ 18; App. 33, ¶ 25. Then, he explained *why* Defendants overcharged him -- as part of a deliberate scheme to harvest a "disguised profit" from equipment lessees. App. 36, ¶ 33.

Beyond the who, what, when, and why, Dr. Anapoell also alleged the "how" with considerable specificity, spelling out with particularity the several methods by which Defendants manipulated the insurance charges to exceed their actual costs: by charging an inflated billing and collection component, by charging excessive interest above the cost of funds advanced, and by failing to take into account discounts and rebates on the insurance premiums. App. 31, ¶ 16; App. 32-33, ¶ 24; App. 36, ¶ 33.

The district court's reasoning, apparently adopted by the Tenth Circuit's summary analysis, appeared to imply that Dr. Anapoell could not state his claims absent a factual showing of Defendants' actual expenses, "market rates [for insurance], industry standards, or course of dealing." App. 20. Apart from the difficulty of such an extensive showing at the pleading stage without the benefit of discovery, the lower courts held Dr. Anapoell to an extraordinarily exacting standard. The law requires only a "short and plain statement of the claim" (FED. R. CIV. P. 8(a)(2)), not a preliminary synopsis of evidentiary proof, nor an infinite regress of supporting allegations. *Ashcroft*, 129 S. Ct. at 1949 ("the plausibility standard is not akin to a 'probability requirement'"); *Twombly*, 550 U.S. at 555 (complaint does not even need "detailed factual allegations" to survive).

2. Dr. Anapoell Sufficiently Stated His Claim for Breach of the Implied Covenant of Good Faith.

Under the governing law of Utah, the covenant of good faith and fair dealing is an implied term in every contract, requiring the parties to refrain from doing anything to frustrate the other party's right to receive the benefits the contract, especially when one party enjoys discretion in performing its obligations. *Eggett v. Wasatch Energy Corp.*, 94 P.3d 193, 197 (Utah 2004); *Markham v. Bradley*, 173 P.3d 865, 872 (Utah Ct. App. 2007). As distinguished from a contract's express terms, the covenant is based on judicially recognized duties not found within the four corners of the contract. *Markham*, 173 P.3d at 871.

Dr. Anapoell alleged that, by failing to ascertain the real expense of obtaining insurance and instead charging Dr. Anapoell fabricated figures, Defendants violated the implied covenant of good faith and fair dealing inherent in the equipment lease. App. 31-32, ¶ 17; App. 37, ¶¶ 39-40; App. 31, ¶ 16; App. 32-33, ¶ 24.

The lower courts mistakenly found that Dr. Anapoell's allegations in support of his claim for breach of the covenant of good faith and fair dealing were factually insufficient. App. 23-24; App. 9 (adopting reasoning of district court). They were not. Dr. Anapoell did not tender a "formulaic recitation" of the claim's elements. *Twombly*, 550 U.S. at 555. Rather, he alleged that Defendants failed to ascertain their expense for obtaining insurance and then charged an excessive, fabricated amount. App. 36-37, ¶¶ 36-41; App. 31-32, ¶ 17. These allegations alone, taken as true, are a sufficient factual basis for the second cause of action. Dr. Anapoell was under no obligation to draft "detailed factual allegations" (*Twombly*, 550 U.S. at 555),

but only to make a short and plain statement of his claim. FED. R. CIV. P. 8(a)(2).

Even still, Dr. Anapoell went further. He incorporated each of the S.A.C.'s preceding allegations in support of his claim for breach of covenant. App. 36, ¶ 36. These allegations, as detailed in section I.B.1 *ante*, form an entire extra tier of detailed factual support for the second cause of action, beyond what the law requires.

II. The Lower Courts Misinterpreted a Contractual Provision Requiring Defendants to Charge Only Their "Expense" of Obtaining Insurance and Nothing More.

In adopting the district court's reasoning, the Tenth Circuit also appears to have misinterpreted the plain language of Dr. Anapoell's equipment lease.

A. Under Utah Law, Unambiguous Contract Terms Must Be Given Effect by the Courts.

The equipment lease provides that it shall be governed by the law of Utah. App. 47, ¶ 16. In Utah, "[t]he underlying purpose in construing or interpreting a contract is to ascertain the intentions of the parties to the contract." *Green River Canal Co. v. Thayn*, 84 P.3d 1134, 1140 (Utah 2003). To that end, a court applying Utah law must first look to the contract's four corners to determine the parties' intentions, which are controlling. *Bakowski v. Mountain States Steel, Inc.*, 52 P.3d 1179, 1184 (Utah 2002).

When the contract's language is unambiguous, the court does not resort to extrinsic evidence of the contract's meaning, and the court determines the parties' intentions from the plain meaning of the contractual language as a matter of law. *Bakowski*, 52 P.3d at 1184; *Thayn*, 84 P.3d at 1141. A contractual provision is ambiguous only if it is

reasonably capable of more than one interpretation. *Bakowski*, 52 P.3d at 1184.

Here, the lease language concerning the insurance charge is clear and unambiguous. Under the lease, Dr. Anapoell could choose to procure his own equipment insurance and provide proof thereof to Defendants. App. 42, ¶ 8. Alternatively, the lease provided, "[i]n the event that Lessor determines that any such insurance is not in effect, Lessor may (but shall not be required to) obtain such insurance at Lessee's expense." *Id.* (emphasis added).

Courts often look to the dictionary definition of a term to confirm its ordinary, plain meaning. *E.g.*, *Moroni Feed Co. v. Mut. Serv. Cas. Ins. Co.*, 287 F.3d 1290, 1293 (10th Cir. 2002) (applying Utah law). Here, the key phrase is "at Lessee's expense." App. 42, ¶ 8. In ordinary usage, "expense" is defined as a "cost or charge," as in the phrases "the expense of a good meal" or "built the monument at their own expense." *Random House College Dictionary* 465 (rev. ed. 1984); *Dictionary.com Unabridged* (ver. 1.1), *at* http://www.dictionary.reference.com/browse/expense (Jul. 20, 2009) ("expense of a good meal"); *see also Webster's Ninth New Collegiate Dictionary* 437 (1991) ("expense" means "financial burden or outlay," as used in "built the monument at their own expense"). The insurance provision uses the term "expense" in exactly the same way: it speaks of "obtain[ing] such insurance at Lessee's expense," just as one would ordinarily talk about the expense, cost, or charge of a "good meal," or a monument "built at their own expense." App. 42, ¶ 8.

The insurance provision is therefore unambiguous in its meaning. Defendants were entitled to charge Dr. Anapoell for the "expense" of "obtain[ing] such insurance" and nothing more. To hold otherwise would be to render the term "expense" a nullity and to presume that the

parties bargained with the absurd intention that Dr. Anapoell would pay unlimited, fictional amounts fabricated by Defendants so long as the sums were labeled part of the "expense" of obtaining insurance.

Yet, the lower courts held that the insurance provision permitted Defendants to charge amounts in excess of the real "expense" of obtaining insurance, including amounts not actually incurred and amounts unrelated to obtaining insurance. App. 19, 20, 23. Such an interpretation upends the plain language and rewrites the lease, engrafting a term not agreed upon by the parties. Further, the lower courts' interpretation impermissibly results in a better contract for Defendants than they wrote for themselves. *Bakowski*, 52 P.3d at 1185.

Importantly, the lease may well allow Defendants to pass on costs associated with obtaining insurance coverage beyond the price of the policy itself. Dr. Anapoell contends, however, that Defendants breached the lease by inflating the amounts charged over the expenses actually incurred. App. 31, ¶ 16; App. 32-33, ¶ 24; App. 36, ¶ 33.

With this in mind, the district court's interpretation of the lease (apparently adopted by the Tenth Circuit's summary analysis) is puzzling and even self-contradictory. On the one hand, the lower courts appear to have rejected Dr. Anapoell's claim that the lease's plain language limits the insurance charge to Defendants' real expense, but they also held that all amounts charged must have a "nexus" to the insurance coverage. App. 18. Yet, to the extent an expense is not actually incurred, then it lacks any "nexus" in reality to the expense of obtaining insurance coverage. The parties bargained over actual, tangible expenses that exist in the real world. *See Thayn*, 84 P.3d at 1140 (purpose of contractual interpretation is to implement parties' expectations). They did not bargain over who

would pay fabricated costs labeled by Defendants to hold some abstract "nexus" to the idea of obtaining insurance coverage. If the insurance clause means anything, it means Defendants could charge for expenses incurred in reality, not just in Defendants' imagination.

B. The Dismissal of the Claim for Breach of the Implied Covenant of Good Faith Stemmed from the Lower Courts' Misinterpretation of the Contract.

The lower courts' dismissal of the claim for breach of the covenant of good faith and fair dealing stemmed from their misinterpretation of the equipment lease. The district court dismissed the claim for breach of the covenant of good faith and fair dealing principally because it found that Dr. Anapoell sought to "establish new, independent rights or duties not agreed upon by the parties – namely, an unwritten requirement that the Defendants may only 'pass on' their actual insurance-related expenses to Dr. Anapoell." App. 23. The Tenth Circuit affirmed this reasoning in a summary analysis.

However, the lease's plain language permitted Defendants to charge only for the "expense" of obtaining insurance, nothing more. Dr. Anapoell did not bargain for an obligation to pay whatever fictional amount Defendants asserted was the "expense." He bargained for a duty to pay the real expense, and was entitled to expect that Defendant's would ascertain that amount in good faith and bill him for it fairly. *Eggett,* 94 P.3d at 197 (the covenant protects the right to receive the benefits of the contract). Therefore, the equipment lease, properly interpreted, gives rise to a valid claim for breach of the implied covenant, and the Tenth Circuit erred in affirming the dismissal of that cause of action.

III. CONCLUSION

This case represents an important opportunity for the Court to clarify the application of the *Twombly* pleading standards in the context of a putative class action which could grow to affect the rights of many thousands of small businesspeople across the nation. Dr. Anapoell respectfully requests that this Court grant this petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

WILLIAM STUART ANAPOELL, M.D., on behalf of himself and others similarly situated, Plaintiff-Appellant, v. AMERICAN EXPRESS BUSINESS FINANCE CORPORATION, a Utah corporation; KEY EQUIPMENT FINANCE, a Michigan corporation Defendants-Appellees.	No. 08-41 14 (D. Utah) (D.C. No. 2:07-CV-00198-TC)

ORDER AND JUDGMENT*

Before **KELLY**, **ANDERSON**, and **BRISCOE**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral

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* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

argument would not materially assist in the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff and appellant William Stuart Anapoell, M.D., acting on behalf of himself and a proposed class,[1] filed his second amended complaint in this contract dispute with defendants, American Express Business Finance Corporation ("AEBF") and Key Equipment Finance, Inc. ("Key"). The district court granted defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss for failure to state a claim. Anapoell appeals the dismissal, which we affirm.

BACKGROUND

On February 18, 2004, Dr. Anapoell entered into a lease for medical equipment from AEBF. The lease transaction was documented by the Master Lease Agreement, the Equipment Schedule to the Master Lease Agreement and the Purchase Order (collectively, the "Agreement"). On October 22, 2004, Key assumed AEBF's lease with Dr. Anapoell.

The Agreement included a provision requiring that the leased medical equipment be insured:

> **Insurance; Indemnification:**
> Lessee shall at all times maintain liability, fire, damage, casualty (covering death and personal injury) and theft insurance on the Equipment in amounts and with insurers acceptable to Lessor, and shall list Lessor

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[1] Dr. Anapoell styles this case as a class action, but, as the district court observed, "no motion to certify the proposed class has been filed with the court, so no class has been approved." 5/28/08 Order at 1 n.1, Appellant's App. Vol. 1 at 117.

> and each Assignee as an additional and loss payee thereon. Such insurance policies shall require the insurer to provide Lessor with at least 30 days prior written notice of any material change in or cancellation of such insurance. In the event that Lessor determines that any such insurance is not in effect, Lessor may (but shall not be required to) obtain such insurance at Lessee's expense.

Agreement at ¶ 8, Appellant's App. Vol. 1 at 35. The Agreement provided that Utah law governs its terms. Although the Agreement gave Dr. Anapoell the option to obtain insurance for the medical equipment, he did not do so. Accordingly, AEBF obtained insurance for the equipment leased by Dr. Anapoell and sent to Dr. Anapoell monthly invoices as follows: $157.35 for property insurance and $90.48 for liability insurance, for a total of $247.83 per month. After Key acquired the lease from AEBF, it continued to send the same monthly invoice to Dr. Anapoell. For a period of time, Dr. Anapoell paid the monthly invoices without incident.

At some point, Dr. Anapoell determined that he was paying too much for the insurance. He therefore brought this action, alleging that "[t]he charges were more than Defendants' expense to obtain insurance coverage." First Amended Compl. ¶ 33, Appellant's App. Vol. 2 at 34. Dr. Anapoell further alleged that "the charge bears no correlation or reasonable relationship to any contractual obligation of its customers or the cost of insurance coverage." First Amended Compl. ¶ 22, id. at 33. He claimed that "Defendants' insurance charge . . . includes amounts other than for coverage obtained by Defendants, in

that Defendants retain a part of the insurance charge as a service fee and/or interest, or Defendants . . . receive payments from insurance agents or insurance companies under the guise of reinsurance cessations, service fees, commissions or rebates." First Amended Compl. ¶ 19, id.

Dr. Anapoell brought this action on behalf of himself as well as a proposed national class and a proposed subclass of similarly situated persons in California, although, as indicated, he has not filed a motion to certify a class. He originally filed his suit in the United States District Court for the Southern District of California, but that court ruled that venue was improper, based upon a valid forum selection clause in the Agreement, and transferred the case to the district court in Utah.

Dr. Anapoell asserted ten causes of action in his First Amended Complaint, including breach of contract and breach of the implied covenant of good faith and fair dealing. Defendants brought motions to dismiss the entire complaint on the basis that Dr. Anapoell had not alleged claims upon which the court could grant relief and that his fraud allegations did not meet the heightened pleading standard required by Fed. R. Civ. P. 9(b).[2] The district court dismissed Dr. Anapoell's claim for breach of contract without prejudice, stating: "[g]iven the silence of the Agreement regarding the amount Defendants could charge, the court simply cannot find that Dr. Anapoell has stated a claim for breach of contract with the vague and conclusory allegations he provides.... To the extent he can validly allege a breach with more definiteness, then

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[2] Dr. Anapoell alleged several fraud claims, including fraudulent concealment and violations of the Utah Unfair Practices Act, the UCC and the California Business and Professions Code through fraudulent business practices.

the court will consider granting leave to amend." 11/29/07 Order at 8, Appellees' Supp. App. at 60. The court similarly dismissed Dr. Anapoell's implied covenant claim without prejudice, stating "[h]is current allegations, which do not contain any detail concerning his claim, are simply too vague and conclusory to satisfy his pleading burden." 11/29/07 Order at 10, id. at 62. Dr. Anapoell's remaining claims were dismissed with prejudice.

Dr. Anapoell filed a motion for leave to amend, which defendants did not oppose. The district court accordingly granted the motion. Dr. Anapoell then filed his Second Amended Complaint, in which he alleged:

> Defendants' monthly insurance charge includes amounts over the true insurance premium plus reasonable expenses to obtain that insurance in that the monthly insurance charge includes a "billing and collecting" fee (with no corresponding cost to Defendants) and/or undisclosed interest at grossly excessive rates for Defendants' "financing" of the premium (with rates well over the cost of any actual funds advanced); and/or that the monthly charge includes amounts over the true insurance premium and reasonable expenses to obtain that insurance because Defendants (or their alter ego affiliates) receive payments from insurance agents or insurance companies under the guise of reinsurance cessations, service fees, commissions or rebates with no corresponding costs or risk.

Second Amended Compl. ¶¶ 16, 24, Appellant's App. Vol. 1 at 15, 16.

Dr. Anapoell asserted, alternatively, that the "Defendants breached the Agreement by failing to ascertain their expense for obtaining insurance by charging [Dr. Anapoell] and class members some random amount." Second Amended Compl. ¶ 34, id. at 19. He further alleged that:

> The charges assessed for insurance are so disproportionate with the true expense of obtaining insurance that the purpose of the charge could not have been related to insurance as mandated by the contract's terms, but instead is a disguised profit center allowing Defendants to secretly charge more for leasing the equipment to Plaintiffs than Plaintiffs agreed to pay.

Second Amended Compl. ¶ 39, id. at 20.

AEBF and Key responded with another motion to dismiss, contending that Dr. Anapoell's Second Amended Complaint should be dismissed with prejudice because he does not state a claim for which relief may be granted. The district court granted defendants' motions, concluding, with respect to the breach of contract claim:

> The court finds that the language of the Insurance Provision is unambiguous. The provision allows the Defendants, without limitation or qualification, to obtain insurance upon [Dr. Anapoell's] failure to do so and to charge [Dr. Anapoell] for the expense of obtaining the insurance. . . .
> . . . Essentially, Dr. Anapoell interprets "Lessee's Expense" to
> mean "Lessor's Actual Cost and No More." But Dr. Anapoell cannot and does not point

> to any express term in the Agreement to support his interpretation. . . .
>
> Dr. Anapoell is reading language into the Agreement that does not exist, and he does not allege any course of dealing between the parties or usage of trade that would suggest the limitation he now advocates. The court need not, and does not, accept Dr. Anapoell's interpretation of the Agreement because it is contradicted by the express terms of the Agreement.

5/28/08 Order at 7, Appellant's App. Vol. 1 at 123. After determining that other allegations relating to the breach of contract claim were conclusory, the court found that "Dr. Anapoell alleges breach of a promise that was never made and fails to meet his pleading burden concerning a promise that was made. For these reasons, his claim for breach of contract is dismissed with prejudice for failure to state a claim for relief that may be granted." 5/28/08 Order at 9, id. at 125. The court further observed that "allowing further amendments would be futile." Id. n.5.

With respect to Dr. Anapoell's claim for breach of implied covenant of good faith and fair dealing, the district court found, applying Utah law, that:

> . . . the implied covenant may not be interpreted to make a better deal for the party than he made for himself.
> When determining whether a party has breached the implied
> covenant of good faith and fair dealing the court looks to the express contractual provisions as well as the course of dealings between the parties. . . .

> He contends that the Defendants breached the covenant by charging grossly excessive fees. Not only is this conclusory, but it attempts to establish new, independent rights or duties not agreed upon by the parties—namely, an unwritten requirement that the Defendants may only "pass on" their actual insurance-related expenses to Dr. Anapoell.
>
> . . . [Further], the express terms of the Insurance Provision (Dr. Anapoell's right and obligation to obtain insurance on his own) imposed a limitation on Defendants' exercise of discretion.
>
> In short, Dr. Anapoell's expectations are not justified. Taking the well-pleaded non-conclusory allegations as true, Dr. Anapoell's right to receive the fruits of the contract was not destroyed by the Defendants. And that is what must be shown to survive the Defendants' motions to dismiss.

5/28/08 Order at 10-12, id. at 126-28. The court again found that "[g]iven the number of chances [Dr. Anapoell] has had to satisfactorily plead his claims, granting further leave to amend would be futile." 5/28/08 Order at 12 n.6, id. at 128. The district court accordingly dismissed Dr. Anapoell's claims for breach of contract and breach of the implied covenant of good faith and fair dealing with prejudice, for failure to state a claim. This appeal followed.

Dr. Anapoell argues that district court misinterpreted the "contractual provision requiring Defendants to charge only their 'expense' of obtaining

insurance and nothing more"; that he "alleged violations of the insurance provision with sufficient factual elaboration"; and that the district court "misapplied standards relating to the implied covenant of good faith and fair dealing." Appellant's Op. Br. at i-ii. We disagree, and affirm the district court's dismissal of the Second Amended Complaint with prejudice.

DISCUSSION

"Because the sufficiency of a complaint is a question of law, we review de novo the district court's grant of a motion to dismiss pursuant to Federal Rule Civil Procedure 12(b)(6), applying the same standards as the district court." Russell v. United States, 551 F.3d 1174, 1178 (10th Cr. 2008) (quotations omitted).

> In the Rule 12(b)(6) context, we look for plausibility in the complaint. In particular, we look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief. Rather than adjudging whether a claim is improbable, factual allegations in a complaint must be enough to raise a right to relief above the speculative level.

Kay v. Bemis, 500 F.3d 1214, 1218 (10th Cir. 2007) (citations and quotations omitted).

We have thoroughly reviewed the record in this case, and we affirm the district court's order for substantially the reasons contained in that order. We also conclude that the district court did not abuse its discretion in determining that further amendment of the complaint in this case would be futile.

CONCLUSION

For the foregoing reasons, we AFFIRM the order of the district court.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF UTAH
CENTRAL DIVISION

WILLIAM STUART ANAPOELL, M.D., on behalf of himself and others similarly situated, Plaintiff, vs. AMERICAN EXPRESS BUSINESS FINANCE CORPORATION and KEY EQUIPMENT FINANCE, INC., Defendants.	ORDER AND MEMORANDUM DECISION Case No. 2:07-CV-198-TV

After Plaintiff William Anapoell, M.D.,[1] filed his Second Amended Complaint in this contract dispute, the Defendants filed their second round of motions to dismiss, which are now before the court. (Six months ago, the court dismissed Dr. Anapoell's First Amended Complaint but granted him the opportunity to cure pleading deficiencies in his contract claims.)

Dr. Anapoell leased medical equipment from Defendants American Express Business Finance Corporation (AEBF) and Key Equipment Finance, Inc.

[1] Dr. Anapoell brings this suit as a class action, but no motion to certify the proposed class has been filed with the court, so no class has been approved.

(Key). He alleges that Defendants breached the lease's express terms and implied covenant of good faith and fair dealing by violating the lease's insurance provision, which states, "Lessor may (but shall not be required to) obtain insurance at Lessee's expense." Specifically, he alleges that Defendants grossly overcharged him for the insurance and costs to obtain it, and charged him for items unrelated to such insurance.

Because the unambiguous insurance provision does not contain the limitation Dr. Anapoell reads into it, and because Dr. Anapoell did not cure the pleading deficiencies of his earlier complaint, the court holds that Dr. Anapoell has not stated a claim for which relief may be granted. Accordingly, under Rule 12(b)(6), Defendants' motions to dismiss all claims with prejudice are GRANTED.

PROCEDURAL BACKGROUND

Last fall, the court dismissed the claims alleged in Dr. Anapoell's First Amended Complaint. (See Nov. 29, 2007 Order (Dkt # 44).) Most were dismissed with prejudice, but his claims for breach of contract and breach of the implied covenant were dismissed without prejudice. (Id. at 26.) The court ruled as follows:

> Given the silence of the Agreement regarding the amount the Defendants could charge, the court simply cannot find that Dr. Anapoell has stated a claim for breach of contract with the vague and conclusory allegations he provides. The court dismisses his claim, but without prejudice. To the extent he can validly allege a breach with more definiteness, then the court will consider granting leave to amend.
>
> . . .

> As was done for the breach of contract claim, the court dismisses the implied covenant claim without prejudice. Dr. Anapoell may file a motion for leave to amend his claim for breach of the implied covenant, but any new set of factual allegations must demonstrate breach of an implied promise that does not establish a new right under the written contract. His current allegations, which do not contain any detail concerning his claim, are simply too vague and conclusory to satisfy his pleading burden.

(Id. at 8, 10 (internal citation and footnote omitted).)

Dr. Anapoell did file a motion for leave to amend, which Defendants did not oppose. Accordingly, the court granted the motion. (See Jan. 12, 2008 Order (Dkt # 51).) Dr. Anapoell then filed his Second Amended Complaint, and AEBF and Key each responded with a motion to dismiss, contending that Dr. Anapoell's Second Amended Complaint should be dismissed with prejudice because he does not state a claim for which relief may be granted.

FACTUAL BACKGROUND[2]

On February 18, 2004, Plaintiff William Anapoell, M.D., entered into a lease for medical equipment with Defendant American Express Business Finance Corporation (AEBF). That lease transaction was documented by the Master Lease Agreement, the Equipment Schedule to the Master Lease Agreement, and the Purchase Order

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[2] The background facts are taken from Dr. Anapoell's Second Amended Complaint and are taken as true for purposes of this order only. See Tal v. Hogan, 453 F.3d 1244, 1252 (2006), cert. denied, 127 S. Ct. 1334 (2007) (on motion to dismiss, well-pleaded factual allegations in complaint are taken as true for purpose of analysis).

(collectively "Agreement"). (See Exs. A-C, attached to AEBF's Mem. Supp. Mot. Dismiss Second Am. Compl.) On October 22, 2004,[3] Defendant Key Equipment Finance, Inc. (Key) assumed AEBF's lease with Dr. Anapoell when it acquired the equipment leasing portfolio of AEBF.

The Agreement contains a provision requiring that the leased medical equipment be insured:

> **Insurance; Indemnification:**
> Lessee shall at all times maintain liability, fire, damage, casualty (covering death and personal injury) and theft insurance on the Equipment in amounts and with insurers acceptable to Lessor, and shall list Lessor and each Assignee as an additional and loss payee thereon. Such insurance policies shall require the insurer to provide Lessor with at least 30 days prior written notice of any material change in or cancellation of such insurance. In the event that Lessor determines that any such insurance is not in effect, Lessor may (but shall not be required to) obtain such insurance at Lessee's expense.

(Master Lease Agreement (attached as Ex. A to AEBF's Mem. Supp. Mot. Dismiss Second Am. Compl.) ¶ 8 (emphasis added) [hereinafter "Insurance Provision"].)

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[3] Although Dr. Anapoell did not attach a copy of the lease documents to his Second Amended Complaint, where a written contract is referred to in a complaint and is central to a breach of contract claim, but is not submitted for judicial review, an indisputably authentic copy of the contract may be considered on a motion to dismiss. GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997). Accordingly, the court considers the lease documents to be part of the Second Amended Complaint, and it need not convert the Defendants' motions to dismiss to motions for summary judgment. Id.

Although the Insurance Provision gave Dr. Anapoell the option to purchase insurance on his own, he did not do so. Consequently, AEBF obtained insurance for the equipment leased by Dr. Anapoell and sent Dr. Anapoell monthly invoices for the following charges: $157.35 for Property Insurance and $90.48 for Liability Insurance, for a total of $247.83 per month. (After Key acquired the lease from AEBF, Key sent the same monthly invoices to Dr. Anapoell.)

Dr. Anapoell interprets the Insurance Provision to require that Defendants charge no more than their actual cost of insurance plus reasonable expenses actually incurred to obtain the insurance mandated by the Agreement. According to Dr. Anapoell, the monthly charge "greatly exceeds" the limited amount that can be charged under the Agreement. (Second Am. Compl. ¶ 16.)

Dr. Anapoell paid the monthly invoices for a time, "not knowing they were grossly excessive." (Id. ¶ 25.) According to Dr. Anapoell,

> Defendants' monthly insurance charge includes amounts over the true insurance premium plus reasonable expenses to obtain that insurance in that the monthly insurance charge includes a "billing and collecting" fee (with no corresponding cost to Defendants) and/or undisclosed interest at grossly excessive rates for Defendants' "financing" of the premium (with rates well over the cost of any actual funds advanced); and/or in that the monthly charge includes amounts over the true insurance premium and reasonable expenses to obtain that insurance because Defendants (or their alter ego affiliates) receive payments from insurance agents or insurance companies

> under the guise of reinsurance cessations, service fees, commissions or rebates with no corresponding costs or risk.

(Id. ¶¶ 16, 24.) Dr. Anapoell alleges, in the alternative, that the "Defendants breached the Agreement by failing to ascertain their expense for obtaining insurance by charging Plaintiff and class members some random amount." (Id. ¶ 34.) Finally, he says:

> The charges assessed for insurance are so disproportionate with the true expense of obtaining insurance that the purpose of the charge could not have been related to insurance as mandated by the contract's terms, but instead is a disguised profit center allowing Defendants to secretly charge more for leasing the equipment to Plaintiffs than Plaintiffs agreed to pay.

(Id. ¶ 39 (emphasis added); see also id. ¶ 33 (same).) Stated another way, Defendants "charg[ed] secret fees, fail[ed] to openly and honestly disclose the true source of the charges imposed upon Plaintiffs, and collect[ed] a profit from this activity." (Id. ¶ 40.)

Based on the above, Dr. Anapoell asserts claims for breach of contract and breach of the implied covenant of good faith and fair dealing.

ANALYSIS

Standard of Review

When reviewing a Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief may be granted, the court must presume the truth of all well-pleaded facts in the complaint, but need not consider conclusory allegations. Tal v. Hogan, 453 F.3d 1244, 1252 (2006), cert. denied, 127 S. Ct. 1334 (2007); Mitchell v. King, 537 F.2d

385, 386 (10th Cir. 1976). Conclusory allegations are allegations that "do not allege the factual basis" for the claim. Brown v. Zavaras, 63 F.3d 967, 972 (10th Cir. 1995). See also Hall v. Bellmon, 935 F.2d 1106, 1110 (10th Cir. 1991) ("conclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based") (emphasis added). The court is not bound by a complaint's legal conclusions, deductions and opinions couched as facts. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007). And although all reasonable inferences must be drawn in the non-moving party's favor, Tal, 453 F.3d at 1252, a complaint will only survive a motion to dismiss if it contains "enough facts to state a claim to relief that is plausible on its face." Twombly, 127 S. Ct. at 1969, quoted in Ridge at Red Hawk, LLC v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007).

Claim for Breach of Contract

Interpretation of the Insurance Agreement

Under Utah law,[4] interpretation of the terms of the Agreement is a question of law for the court to decide. Green River Canal Co. v. Thayn, 84 P.3d 1134, 1140 (Utah 2003). In contractual dispute cases, a court first looks to the contract's four corners to determine the parties' intentions. Bakowski v. Mountain States Steel, Inc., 52 P.3d 1179, 1184 (Utah 2002).

> If the language within the four corners of the contract is unambiguous, then a court does not resort to extrinsic evidence of the contract's

[4] This court applies Utah law to the contract claims based on the choice of law provision in the Agreement. (See Master Lease Agreement ¶ 16 ("EACH LEASE SHALL BE GOVERNED BY THE LAWS OF UTAH, WITHOUT REGARD TO ITS PRINCIPLES OF CONFLICTS OF LAW OR CHOICE OF LAW.") (emphasis in original).)

> meaning, and a court determines the parties' intentions from the plain meaning of the contractual language as a matter of law.

Id.

Here, the Agreement provides, in relevant part, that, "[i]n the event that Lessor determines that any such insurance is not in effect, Lessor may (but shall not be required to) obtain such insurance at Lessee's expense." (Agreement ¶ 8 (emphasis added).) The court finds that the language of the Insurance Provision is unambiguous. The provision allows the Defendants, without limitation or qualification, to obtain insurance upon Plaintiff's failure to do so and to charge Plaintiff for the expense of obtaining the insurance.

Dr. Anapoell contends that the Insurance Provision "limits the Defendants to charging no more than" their actual expense. (Second Am. Compl. ¶ 32.) Essentially, Dr. Anapoell interprets "Lessee's Expense" to mean "Lessor's Actual Cost And No More." But Dr. Anapoell cannot and does not point to any express term in the Agreement to support his interpretation.

The Insurance Provision's express language does not limit or proscribe the imposition of any billing fees, collection fees, commissions or other charges related to procuring the insurance at issue. Indeed, the parties agree that the plain language of the Agreement allows the Defendants to charge for costs that have a nexus to the insurance coverage.

Dr. Anapoell is reading language into the Agreement that does not exist, and he does not allege any course of dealing between the parties or usage of trade that would suggest the limitation he now advocates. The court need not, and does not, accept Dr. Anapoell's interpretation of

the Agreement because it is contradicted by the express terms of the Agreement.

Unrelated Costs or Expenses

Paragraph 16 of the Second Amended Complaint, on which Dr. Anapoell heavily relies to show improper charges, lists two types of items that, on their face, are related to obtaining insurance: (1) billing and collection fees; and (2) interest charged on the money "advanced" by the Defendants to pay the lessee's premium to the insurance company.

> Dr. Anapoell then alleges that the monthly charge includes amounts over the true insurance premium and reasonable expenses to obtain that insurance because Defendants (or their alter ego affiliates [not identified in the Complaint]) receive payments from insurance agents or insurance companies under the guise of reinsurance cessations, service fees, commissions or rebates with no corresponding costs or risk.

(Second Am. Compl. ¶ 16 (emphasis added).) Apparently he claims that Defendants received discounts or reimbursement from insurance companies and agents, which reduced (or perhaps eliminated) the actual premium cost, and that such savings should have been passed on to Dr. Anapoell under the terms of the Agreement. This allegation does not refer to a charge unrelated to the cost of obtaining insurance. It simply relates to his theory that "Lessee's expense" means Defendants' actual cost.

The only allegation that comes close to alleging a charge unrelated to the cost of obtaining insurance is in Paragraph 33. There, Dr. Anapoell alleges that:

> Defendants breached the leases by charging an amount far in excess of and unrelated to

> their expense of obtaining insurance, damaging Plaintiff and class members. In reality the insurance charge is simply a disguised profit center designed to collect additional monies from Plaintiffs that they have not agreed to pay. When Plaintiffs contracted with Defendants they agreed to pay for a monthly lease charge in a set amount. They also agreed to pay for the expense of obtaining liability and property insurance coverage as mandated by the contract and therefore, by assessing the charge for a purpose not agreed to, Defendants are in breach.

(Second Am. Compl. ¶ 33 (emphasis added).) His claim that charges were "far in excess of and unrelated to [Defendants] expense of obtaining insurance" is conclusory. So is his characterization of the charges as a "disguised profit center." His complaint does not contain any details about charges not related to the costs of obtaining insurance. He provides no reference point for comparing what was charged versus what one could reasonably expect based on, for example, market rates, industry standards, or course of dealing. He does not define "grossly excessive" or indicate what he believes to be the amount of the "true" insurance premium and reasonable expenses.

Consequently, the only allegation concerning unrelated costs is insufficient to satisfy his pleading burden.

Failure to Ascertain Costs

Finally, Dr. Anapoell contends, in the alternative, that "Defendants breached the Agreement by failing to ascertain their expense for obtaining insurance" (id. ¶ 34), and pass on no more than the actual expense (see id. ¶¶

16, 32). This conclusory assertion has no other allegations to support it. And the Agreement's terms do not set forth any duty on the part of the Defendants to ascertain the expense to Plaintiff's benefit.

Conclusion

In short, Dr. Anapoell alleges breach of a promise that was never made and fails to meet his pleading burden concerning a promise that was made. For these reasons, his claim for breach of contract is dismissed with prejudice for failure to state a claim for relief that may be granted.[5]

Claim for Breach of Implied Covenant of Good Faith and Fair Dealing

Dr. Anapoell also asserts a cause of action for breach of the implied covenant of good faith and fair dealing. In his Second Amended Complaint, he alleges that

> Defendants have breached the implied covenant of good faith and fair dealing of the Agreement by charging secret fees, failing to openly and honestly disclose the true source of the charges imposed upon Plaintiffs, and collecting a profit from this activity. Defendants have thereby deprived and/or injured Plaintiffs' ability to obtain the fruits and benefits of the Agreement.

(Second Am. Compl. ¶ 40.)

Utah recognizes the existence of the implied covenant in all contracts:

> Under this covenant, the contracting parties each impliedly promise not to

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[5] The court also finds that allowing further amendments would be futile.

> intentionally or purposely do anything that will destroy or injure the other party's right to receive the fruits of the contract . . . . [T]o comply with the covenant, a party must act consistently with the agreed common purpose and the justified expectations of the other party.

Prince v. Bear River Mut. Ins. Co., 56 P.3d 524, 553 (Utah 2002) (internal citations and quotation marks omitted). But the covenant is not without limitation.

> First, this covenant cannot be read to establish new, independent rights or duties to which the parties did not agree. Second, this covenant cannot create rights and duties inconsistent with express contractual terms. Third, this covenant cannot compel a party to exercise a contractual right "to its own detriment for the purpose of benefitting another party to the contract." Finally, [courts] will not use this covenant to achieve an outcome in harmony with the court's sense of justice but inconsistent with the express terms of the applicable contract.

Markham v. Bradley, 173 P.3d 865, 87 1-72 (Utah Ct. App. 2007) (citations omitted). In other words, the implied covenant may not be interpreted to make a better deal for the party than he made for himself. Malibu Inv. Co. v. Sparks, 996 P.2d 1043, 1048 (Utah 2000).

When determining whether a party has breached the implied covenant of good faith and fair dealing, the court looks to the express contractual provisions as well as the course of dealings between the parties. Brown v. Moore, 973 P.2d 950, 954 (Utah 1998). Here, Dr. Anapoell relies on the breach of contract allegations to support his claim

for breach of the implied covenant. (And those allegations do not contain any information regarding course of dealing between the parties.)

He contends that the Defendants breached the covenant by charging grossly excessive fees. Not only is this conclusory, but it attempts to establish new, independent rights or duties not agreed upon by the parties – namely, an unwritten requirement that the Defendants may only "pass on" their actual insurance-related expenses to Dr. Anapoell.

Dr. Anapoell improperly seeks to rewrite the Insurance Provision and prevent the Defendants from exercising their right under the Agreement to charge fees and associated expenses incurred in obtaining the insurance that Plaintiff elected not to procure. See Rio Algom Corp. v. JIMCO Ltd., 618 P.2d 497, 505 (Utah 1980) ("A duty of good faith does not mean that a party vested with a clear right is obligated to exercise that right to its own detriment for the purpose of benefitting another party to the contract. A court will not enforce asserted rights that are not supported by the contract itself.").

Dr. Anapoell then contends, in the alternative, that the Plaintiffs had, but failed to satisfy, an obligation to "ascertain their expense for obtaining insurance" and then charged Dr. Anapoell a "random amount." (Second Am. Compl. ¶ 34.) Dr. Anapoell's allegation in Paragraph 34 of the complaint is so conclusory that it does not satisfy the standard that a claim must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1969 (2007).

Finally, Dr. Anapoell contends that Defendants violated the covenant because they abused their discretionary power under the Insurance Provision. He notes that "[w]hen one of the parties retains the unilateral

power or discretion to define and effectuate certain terms in the contract, it must exercise such power or discretion in a good faith and reasonable manner." (Pl.'s Mem. Opp'n (Dkt # 57) at 9 (citations omitted).) But the court is not convinced that the Insurance Provision grants Defendants "unilateral power or discretion" in this situation, because Dr. Anapoell had a remedy – he could have obtained his own insurance, as the Agreement allowed. But he did not do that. "[T]he degree to which a party to a contract may invoke the protections of the covenant turns on the extent to which the contracting parties have defined their expectations and imposed limitations on the exercise of discretion through express contract terms." Markham v. Bradley, 173 P.3d 865, 872 (Utah Ct. App. 2007) (quotation marks and citations omitted). This case, as pled, does not fit into the situation where a party to the contract has no control over the situation. Instead, the express terms of the Insurance Provision (Dr. Anapoell's right and obligation to obtain insurance on his own) imposed a limitation on Defendants' exercise of discretion.

In short, Dr. Anapoell's expectations are not justified. Taking the well-pleaded nonconclusory allegations as true, Dr. Anapoell's right to receive the fruits of the contract was not destroyed by the Defendants. And that is what must be shown to survive the Defendants' motions to dismiss.

For these reasons, the court finds that Dr. Anapoell has failed to state a claim for breach of the implied covenant of good faith and fair dealing. Accordingly, his claim for breach of the implied covenant is dismissed with prejudice.[6]

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[6] Given the number of chances he has had to satisfactorily plead his claims, granting further leave to amend would be futile.

ORDER

For the foregoing reasons, the court GRANTS Key Equipment Finance Inc.'s Motion to Dismiss Plaintiff's Section Amended Class Action Complaint (Dkt # 47), and American Express Business Finance Corporation's Motion to Dismiss Plaintiff's Second Amended Complaint (Dkt # 55).

DATED this 28th day of May, 2008.

BY THE COURT:

s/
TENA CAMPBELL
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States
Court of Appeals
Tenth Circuit
April 22, 2009
Elisabeth A.
Shumaker
Clerk of Court

WILLIAM STUART ANAPOELL, M.D., on behalf of himself and others similarly situated,

Plaintiff-Appellant,

v.

AMERICAN EXPRESS BUSINESS FINANCE CORPORATION, a Utah Corporation, et al.,

Defendants-Appellees.

No. 08-41 14

ORDER

Before **KELLY, ANDERSON**, and **BRISCOE**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

s/

ELISABETH A. SHUMAKER, Clerk

UNITED STATES DISTRICT COURT

Central Division for the District of Utah

FILED
U.S. District Court
2008 Jun 3 P 5:00
DISTRICT OF UTAH
BY: s/
DEPUTY CLERK

William Stuart Anapoell, M.D. v. American Express Business Finance Corporation and Key Equipment Finance, Inc.	JUDGMENT IN A CIVIL CASE Case Number: 2:07 cv 198 TC

IT IS ORDERED AND ADJUDGED
that all remaining claims of the plaintiff are dismissed with prejudice for failure to state a claim for which relief may be granted.

June 3, 2008
Date

D. Mark Jones
Clerk of Court
s/
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

WILLIAM STUART ANAPOELL, M.D., on behalf of himself and others similarly situated, Plaintiff, v. AMERICAN EXPRESS BUSINESS FINANCE CORPORATION, a Utah corporation, and KEY EQUIPMENT FINANCE, INC., a Michigan corporation, Defendants.	SECOND AMENDED COMPLAINT (Jury Trial Demanded) Case No. 2:07CV00198 TC Honorable Tena Campbell

Plaintiff William Stuart Anapoell ("Plaintiff"), on behalf of himself and on behalf of others similarly situated, by his undersigned attorneys, complains and alleges against Defendant American Express Business Finance Corporation and Defendant Key Equipment Finance, Inc. collectively "Defendants") on information and belief, except those allegations which pertain to the named Plaintiff or his attorneys, which are alleged on personal knowledge, as follows:

PARTIES

1. William Stuart Anapoell is an individual resident of San Diego, California.

2. American Express Business Finance ("AmEx") is a Utah corporation conducting business in locations throughout the United States, including Utah and California. AmEx provides leasing programs through vendors of equipment throughout the Nation, including vendors in Salt Lake County, Utah.

3. Key Equipment Finance, Inc. ("Key") is a Michigan corporation conducting business in locations throughout the United States, including Utah and California. Key provides leasing programs through vendors of equipment, throughout the Nation, including vendors in Salt Lake County, Utah.

JURISDICTION AND VENUE

4. The court has jurisdiction over this action pursuant to the Class Action Fairness Act of 2005 ("CAFA").

5. There are at least 100 members in each of the proposed plaintiff classes.

6. The combined claims in each class exceed $5 million, exclusive of interest and costs.

7. There is minimal diversity as the named plaintiff is a citizen of California, Defendant AmEx is a citizen of Utah and Defendant Key is a citizen of Michigan.

8. Venue in this case is appropriate in this Court because Defendant AmEx is a citizen of Utah with its principal place of business in Salt Lake County.

ALLEGATIONS CONCERNING BACKGROUND FACTS

9. Defendants own leases covering various types of equipment or other kinds of personal property.

10. On or around October 22, 2004, Key acquired the equipment business leasing portfolio of AmEx.

11. Substantially similar provisions in the leases owned by Defendants require Lessees to provide liability, fire, damage, casualty and theft insurance (naming Defendants as an additional insured and loss payee), but, if the Lessees do not do so, give Defendants the right to obtain insurance coverage and require the Lessee to pay the expense for obtaining that insurance.

12. The substantially similar provisions are analytically identical for purposes herein.

13. One such provision is as follows:

> Insurance; Indemnification:
> Lessee shall at all times maintain liability, fire, damage, casualty (covering death and personal injury) and theft insurance on the Equipment in amounts and with insurers acceptable to Lessor, and shall list Lessor and each Assignee as an additional insured and loss payee thereon. Such insurance policies shall require the insurer to provide Lessor with at least 30 days prior written notice of any material change in or cancellation of such insurance. In the event that Lessor determines that any such insurance is not in effect, Lessor may (but shall not be required to) obtain such insurance at Lessee's expense.

(Emphasis Added.)

14. The substantially similar lease provisions also contain a term providing that the lease can only be modified by written agreement signed by both the Lessor and the Lessee.

15. The substantially similar lease provisions also provide that the lease is not cancelable by the Lessee.

16. After an equipment lease is in place, Defendants communicate with Lessees to "remind" them that the lease requires insurance, and Defendants solicit "evidence of insurance" rom the Lessee. Defendants also advise that the Lessee need do nothing to insure the equipment under Defendants' own policy, in exchange for a monthly insurance charge. Defendants' insurance charge, however, greatly exceeds the true insurance premium plus reasonable expenses to obtain that insurance. Defendants' monthly insurance charge includes amounts over the true insurance premium plus reasonable expenses to obtain that insurance in that the monthly insurance charge includes a "billing and collecting" fee (with no corresponding cost to Defendants) and/or undisclosed interest at grossly excessive rates for Defendants' "financing" of the premium (with rates well over the cost of any actual funds advanced); and/or in that the monthly charge includes amounts over the true insurance premium and reasonable expenses to obtain that insurance because Defendants (or their alter ego affiliates) receive payments from insurance agents or insurance companies under the guise of reinsurance cessations, service fees, commissions or rebates with no corresponding costs or risk.

17. Given that the insurance charge is not stated

as a dollar amount in the lease but is described as alleged above, Defendants had the duty to determine in good faith their expense of obtaining insurance and to charge only an amount reasonably approximating that expense, and no more.

ALLEGATIONS CONCERNING TRANSACTIONS WITH ANAPOELL

18. On or about February 18, 2004, Anapoell entered into a "lease" agreement ("Agreement") with AmEx.

19. Under terms of the Agreement, AmEx leased to Anapoell medical equipment for a period of 60 months at a monthly payment of $2,598.93.

20. Under terms of the Agreement, Anapoell agreed that, if he did not provide property and liability insurance covering the equipment, AmEx had the right, but not the obligation, to obtain insurance and Anapoell agreed to pay that expense.

21. The Agreement contains provisions that its obligations are absolute and cannot be cancelled.

22. The Agreement contains a provision that it can be modified only by written agreement signed by both the Lessor and Anapoell.

23. Anapoell never signed a written agreement modifying the terms of the Agreement.

24. Subsequently, Defendants sent standardized form invoices to Anapoell that included two charges for insurance, in the amounts of $157.35 for Property Insurance and $90.48 for Liability Insurance, for a total of $247.83 per month. The charges were far more than Defendants' expense to obtain insurance coverage, in breach of the Agreement. These charges include amounts over the true insurance premium plus reasonable expenses to obtain that insurance in

that the monthly insurance charge includes a "billing and collecting" fee (with no corresponding cost to Defendants) and/or undisclosed interest at grossly excessive rates for Defendants' "financing" of the premium (with rates well over the cost of any actual funds advanced); and/or in that the monthly charge includes amounts over the true insurance premium and reasonable expenses to obtain that insurance because Defendants (or their alter ego affiliates) receive payments from insurance agents or insurance companies under the guise of reinsurance cessations, service fees, commissions or rebates with no corresponding costs or risk.

25. Anapoell paid the insurance charges for a time, not knowing that they were grossly excessive.

CLASS ALLEGATIONS

Nationwide Class:

26. Plaintiff brings this action on behalf of himself as an individual and on behalf of all other persons similarly situated.

27. Class members are all Lessees who have paid an insurance charge to Defendants or their predecessors-in-interest within the limitation period.

Class Allegations:

28. On information and belief, the exact numbers and identities of all class members are readily ascertainable from the records of Defendants.

29. All causes of action herein have been brought and may properly be maintained as a class action pursuant to the provisions of Federal Rule of Civil Procedure Rule 23 because there is a well-defined community of interest in the litigation and the proposed class is easily ascertainable:

a. Numerosity: On information and belief, members of the Nationwide class and each California class are so numerous that individual joinder of all members would be impracticable.

b. Common Questions Predominate: Common questions of law and fact exist as to all members of the Nationwide class and each California class, and those questions clearly predominate over any questions which might affect members individually. These common questions of law and fact include, for example, whether Defendants have breached their contractual obligations by charging more than their expense to obtain insurance coverage.

c. Typicality: On information and belief, Plaintiff's claims are typical of the claims of the members of the Nationwide class and each California class. Plaintiff and all members of the Nationwide class and each California class sustained damages arising out of defendants' common course of conduct complained of herein.

d. Adequacy: Plaintiff will fairly and adequately protect the interest of the members of the Nationwide class and each California class since Plaintiff has no interests which are adverse to the interests of absent class members and since Plaintiff has retained counsel who have substantial experience and success in the prosecution of class actions and violations of consumer statutes

e. Superiority: A class action is superior to other available means for the fair and efficient adjudication of this controversy since individual joinder of all members would be

impracticable. Class action treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently and without the unnecessary duplication of effort and expense that numerous individual actions would engender. An important public interest will be served by addressing the matter as a class action, substantial economies to the litigants and to the judicial system will be realized, and the potential for inconsistent or contradictory judgments will be avoided.

FIRST CAUSE OF ACTION

Breach of Contract

(By Nationwide Class)

30. Plaintiff hereby incorporates by reference the allegations above, as though fully set forth at this point.

31. Plaintiff entered into an Agreement with AmEx, as set out above, wherein he agreed to pay and in fact did pay, within the statutory period, AmEx for the "expense" of liability and property insurance. Plaintiff performed all of his obligations under the Agreement.

32. Class members Nationwide entered into substantially similar agreements with language analytically identical to the Insurance; Indemnification provision in the Agreement, wherein they agreed to pay, within the statutory period, Defendants for the "expense" of obtaining liability and property insurance coverage. The plain language of the contract limits the Defendants to charging no more than their "expense" of obtaining liability and property insurance coverage.

33. Defendants breached the leases by charging an amount far in excess of and unrelated to their expense of obtaining insurance, damaging Plaintiff and class members. In reality the insurance charge is simply a disguised profit center designed to collect additional monies from Plaintiffs that they have not agreed to pay. When Plaintiffs contracted with Defendants they agreed to pay for a monthly lease charge in a set amount. They also agreed to pay for the expense of obtaining liability and property insurance coverage. The amount charged for insurance by Defendants is not for the expense of obtaining liability and property insurance coverage as mandated by the contract and therefore, by assessing the charge for a purpose not agreed to, Defendants are in breach.

34. In the alternative, Defendants breached the Agreement by failing to ascertain their expense for obtaining insurance and by charging Plaintiff and class members some random amount.

35. As a proximate result of Defendants' conduct, Plaintiff and class members have been damaged in an amount to be proven at trial.

SECOND CAUSE OF ACTION

Breach of the Implied Covenant of Good Faith and Fair Dealing

(By Nationwide Class)

36. Plaintiff hereby incorporates by reference the allegations above, as though fully set forth at this point.

37. Plaintiff and class members entered into a valid and binding agreement with one or both of Defendants.

38. Plaintiff and class members have performed

all of their obligations under the Agreement.

39. Defendants' charging of fees in excess of and wholly unrelated to the expense of obtaining insurance is inconsistent with the agreed common purpose of the Agreement. Defendants did not ascertain their expense of obtaining insurance prior to assessing the charge. The charges assessed for insurance are so disproportionate with the true expense of obtaining insurance that the purpose of the charge could not have been related to insurance as mandated by the contract's terms, but instead is a disguised profit center allowing Defendants to secretly charge more for leasing the equipment to Plaintiffs than Plaintiffs agreed to pay.

40. Defendants have breached the implied covenant of good faith and fair dealing of the Agreement by charging secret fees, failing to openly and honestly disclose the true source of the charges imposed upon Plaintiffs, and collecting a profit from this activity. Defendants have thereby deprived and/or injured Plaintiffs' ability to obtain the fruits and benefits of the Agreement.

41. As a proximate result of Defendants' conduct, Plaintiff and class members have been damaged in an amount to be proven at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief and judgment against Defendants, as follows:

1. Damages according to proof;
2. Reasonable attorneys' fees and costs from the common fund;
3. For costs of suit incurred herein;
4. For prejudgment interest as allowed by law; and

5. For such other and further relief as this Court finds just, equitable and proper.

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial as provided by Rule 38(a) of the Federal Rules of Civil Procedure.

DATED this 15th day of January 2008.

MAGLEBY & GREENWOOD, P.C.
s/
Christine T. Greenwood
Jennifer Fraser Parrish

GORDON & REES, L.L.P.
M.D. Scully
Allison F. Borts
Camille Joy Johnson

AMBRECHT JACKSON, L.L.P.
Edward A. Dean

Attorneys for Plaintiff William Stuart Anapoell, M.D.

[Logo]
American Express
Business Finance

MASTER LEASE AGREEMENT

Master Lease Agreement #544457

Lessor:	Lessee:
American Express Business Finance Corporation 1851 E First Street, Suite 450 Santa Ana, CA 92705	William Stuart Anapoell, MD 4060 4th Ave #505 San Diego, CA 92103 Contact: Phone: (619) 298-1318

1. Master Lease. The undersigned Lessee ("Lessee") unconditionally and irrevocably agrees to lease from the above referenced Lessor (together with all successors and Assignees thereof, collectively, "Lessor") the equipment and other personal property (together with all current and future accessories, additions and attachments thereto, and all replacements and substitutions therefore, collectively, the "Equipment") described in each Equipment Schedule referencing this Master Lease Agreement (each, together with any attachments thereto, a "Schedule') and purchased from the supplier(s) noted in the applicable Schedule (each, a "Supplier"). Each Schedule shall incorporate by reference all of the terms of this Master Lease Agreement and shall constitute a separate lease agreement (each such Schedule, together with such incorporated terms of this Master Lease Agreement, collectively, a "Lease") that is assignable separately from each other Lease. In the event of a conflict between this Master Lease Agreement and the terms of a Schedule, the terms of the Schedule shall prevail. No provision of a Lease may be waived or modified except in a writing signed by Lessor's duly authorized representative.

2. Term. The term of each Lease shall consist of an initial term ("Initial Term") and, one or more renewal terms, if any ("Renewal Term"). The Initial Term and Renewal Term are referred to collectively as the "Term". The Initial Term shall commence on the date the Equipment is accepted for lease by Lessee under the Lease ("Commencement Date") and shall continue for the number of months set forth in the Schedule. Lessee shall be deemed to have accepted the Equipment for lease promptly upon its delivery from the Supplier and, at Lessor's request, shall confirm for Lessor such acceptance.

3. Rent. All advance rent under any Schedule is due and payable upon its execution and is not refundable. All subsequent periodic rental payments payable with respect to each month during the Term ("Periodic Rent") and other amounts due from Lessee to Lessor under such Schedule (together with all advance rentals, "Rent") shall be paid pursuant to the terms set forth in such Schedule. No acceptance of any item of Equipment may be revoked by Lessee. Unless otherwise instructed by Lessor in writing, all payments of Rent shall be made to Lessor's address set forth in the applicable Schedule. Any payment by or on behalf of Lessee that purports to be payment in full for any obligation under any Lease may only be made after Lessor's prior written agreement to accept such payment amount.

4. Rent Payments; Fees. Other than Periodic Rent payable as part of an advance payment, the first payment of Periodic Rent due under the Lease shall be due and payable on the date specified in Lessor's first invoice therefore ("First Payment Date"). Periodic Rent (other than that which is part of any advance payment) is due monthly in advance beginning on the First Payment Date and continuing on the same day of each month during the Term regardless if Lessee receives an invoice therefore. If Lessee

fails to pay any sum due under the lease within five (5) days after its due date, Lessee agrees to pay a late charge equal to (as reasonable liquidated damages and not as a penalty) the greater of $29 or 10% of the amount of each such late payment. If any check or funds transfer request for any Rent is returned to Lessor unpaid, Lessee shall pay Lessor a service charge of $55 for each such returned check or request. Lessee agrees to pay Lessor a documentation and other transaction fees as applicable, as set forth on the Schedule.

5. Equipment. Lessee shall keep the Equipment free of liens, claims and encumbrances, and shall not modify, alter, add to. move, sell, transfer, lease, sublease or otherwise encumber any Equipment or permit any Equipment to become attached to any realty, in each case without the prior written consent of Lessor. Any modification, alteration or addition to any Equipment shall automatically become the sole property of Lessor. Lessor shall have the right to enter Lessee's premises during business hours to inspect any Equipment and observe its use upon at least one (1) day's prior written or verbal notice. Lessee shall comply with all applicable laws, rules and regulations concerning the operation, ownership, use and/or possession of the Equipment, and Supplier's requirements for continued maintenance thereof. If Lessee fails to accept delivery of any Equipment for any purpose, Lessee agrees to pay the price invoiced by Supplier to Lessor therefore and to indemnify and hold Lessor harmless and to defend Lessor (with counsel selected by Lessor) against, any claim brought by Supplier.

6. Obligations Absolute. NOTWITHSTANDING ANY CLAIM OF DEFECT OR ANY OTHER REASON WHATSOEVER, ALL RENTALS AND OTHER PAYMENTS UNDER EACH LEASE SHALL BE PAID BY

LESSEE TO LESSOR OR ITS ASSIGNEES ABSOLUTELY AND UNCONDITIONALLY, WITHOUT ANY DEFENSE, SETOFF, CLAIM OR COUNTERCLAIM OF ANY NATURE. Lessee hereby waives all rights to any indirect, punitive, special or consequential damages in connection with the Equipment or this Lease.

7. Use. All Equipment shall be used solely for business purposes, and not for personal, household or other use. Lessee shall maintain the Equipment in good repair in accordance with the instructions of the manufacturer thereof so that it shall be able to operate in accordance with the manufacturer's specifications. Lessee shall bear the entire risk of loss or damage to the Equipment, and may not transfer, sublease or assign any of its rights or obligations under any Lease or Equipment without Lessor's prior written consent. Lessor shall own the Equipment and may sell, assign, transfer or grant a security interest to any third party (each, an "Assignee") in any Equipment, Rent or Lease without notice to or consent by Lessee.

8. Insurance; Indemnification. Lessee shall at all times maintain liability, fire, damage, casualty (covering death and personal injury) and theft insurance on the Equipment in amounts and with Insurers acceptable to Lessor, and shall list Lessor and each Assignee as an additional insured and loss payee thereon. Such insurance policies shall require the insurer to provide Lessor with at least 30 days' prior written notice of any material change in or cancellation of such insurance. In the event that Lessor determines that any such insurance is not in effect, Lessor may (but shall not be required to) obtain such insurance at Lessee's expense. Upon any loss or damage to any Equipment, Lessee shall continue to pay all Rent hereunder for the remaining Term hereof and shall, at Lessor's sole election, either repair such Equipment or

replace it with comparable equipment satisfactory to Lessor. Lessee shall indemnify, reimburse and defend (with counsel acceptable to Lessor) Lessor, including each Assignee, its and their affiliated companies and its and their officers, directors, employees and agents, on demand, from and against any and all damages, losses, liabilities, expenses, claims or legal proceedings relating to or arising out of this Lease or the ownership, use, operation, possession, sale, lease or maintenance of the Equipment, regardless of whether the term thereof shall have commenced or expired, including (without limitation) Lessor's attorneys' fees and expenses. Lessee's tax and indemnity obligations shall survive the termination of the Lease.

9. UCC Filings. Lessee acknowledges that this Lease is intended to be a "finance lease" as defined in §2A-103(1)(g) of the Uniform Commercial Code, as in effect In Utah ("UCC"). LESSEE WAIVES ANY AND ALL RIGHTS AND REMEDIES OTHERWISE GRANTED TO LESSEE BY UCC §2A-5O8 THROUGH 2A-522. Lessee authorizes Lessor to file UCC financing statements disclosing Lessor's interest in the Equipment and in any "Additional Collateral" set forth in any Schedule. Lessee shall provide Lessor with at least 45 days' prior written notice of any change to Lessee's principal place of business, organization or incorporation.

10. Taxes. Lessee shall pay when and as due all taxes, (together with all interest and penalties for the late payment or non-payment thereof "Taxes") imposed on any lease or the ownership, use, possession, sale or lease of the equipment (whether assessed on Lessor or Lessee) and shall indemnify and hold Lessor harmless from any such Taxes. Lessor may estimate the amount of any such taxes due on the Equipment or this Lease and pay such Taxes on

Lessee's behalf, and Lessee shall pay to Lessor as additional Rent any such amounts, upon Lessor's invoice therefore. In connection with and in addition to each of the payments shown on the first page, you will pay to us our estimate of the annual amount of property Taxes (if applicable) divided by the number of payment per annum. If the actual annual amount of such Taxes differ from the estimated payments made by you, then you will pay us or we will reimburse you (as applicable) the difference. You also agree to pay us upon demand a per annum administration fee for the handling or collecting of any such property Tax or related returned in an amount as we determine but not to exceed $50 per annum. Upon termination/expiration of the Lease you agree to promptly remit 90%of the previous year's personal property Tax due with respect to the Equipment as specified in a written notice from us for application against that year's personal property Tax; provided, you will remain visible for any deficiency.

11. Return of Equipment. Upon the expiration or earlier termination of the Lease, if Lessee has not exercised any option to purchase available to it, Lessee shall at its expense, pack and insure the equipment and send it freight prepaid to a location designated by Lessor in the contiguous 48 states of the United States. All Equipment upon its return to Lessor shall be in the same condition and appearance as when delivered to Lessee, excepting only reasonable wear and tear from proper use and all such Equipment shall be eligible for manufacturer's maintenance. Lessee shall in all events pay Rent and otherwise comply with the Lease until the Equipment has been returned to Lessor.

12. Facsimile Copies. A photocopy or facsimile of this Master Lease Agreement and each Schedule will be legally

admissible under the "best evidence rule." A signed copy of this Master Lease Agreement, any Schedule and/or any related document sent by facsimile shall be treated as an original document and shall be admissible as evidence thereof, and all signatures thereon shall be binding as if manual signatures were personally delivered.

13. Disclaimers. Lessor is not the manufacturer or supplier of any Equipment and is not responsible for any delivery, installation, repair, maintenance or servicing thereof and Lessor shall have no obligations, or liabilities of any kind whatsoever concerning or relating to the Equipment. Lessee has selected each Supplier and manufacturer and all of the Equipment. Neither Supplier nor any manufacturer is an agent of Lessor, and no representative of Supplier is authorized to bind Lessor for any propose or make any representation on Lessor's behalf. So long as Lessee is not in default under the Lease, Lessee is entitled to any and all warranties provided to Lessor by or through Supplier or the manufacturer, and may communicated with Supplier and the manufacturer, and receive those warranties. So long as Lessee is not in default under the Lease, Lessor assigns such warranties to Lessee for the duration of the Lease Term. Lessee agrees to look only to Supplier or the manufacturer for any defect or breach of warranty regarding the Equipment. LESSEE LEASES THE EQUIPMENT OF AN "AS-IS", "WHERE-IS" BASIS. LESSOR MAKES NO REPRESENTATION OR WARRANTY OF ANY KIND WHATSOEVER, EXPRESS OR IMPLIED, REGARDING ANY EQUIPMENT, INCLUDING, WITHOUT LIMITATION, ANY IMPLIED WARRANTIES OF MERCHANTABILITY AND FITNESS FOR A PARTICULAR PURPOSE.

14. Notices. All notices required or provided for in any Lease, shall be in writing and shall be addressed to Lessee

or Lessor, as the case may be, at its address set forth above or such other address as either such party may from time to time designate in writing to the other party. Such notice shall be deemed delivered and effective: (a) upon receipt, if deliver by hand or overnight courier, or (b) three (3) days after deposit with the U.S. Postal Service, if sent certified mail, return receipt requested with postage prepaid. No other means of delivery of notices shall be permitted.

15. Default; Remedies. Lessee will be in "default" hereunder, if any one or more of the following shall occur: (a) Lessee or any Guarantor of any Lease fails to timely pay Lessor and Rental(s) due under the Lease, or (b) Lessee or any such Guarantor breaches any other term of the Lease, or (c) Lessee or any such Guarantor makes any misrepresentation to Lessor, or (d) Lessee or any such Guarantor fails to pay any other obligation owed to Lessor, or the related Guaranty, any of Lessor's affiliats, or any other party, or (e) Lessee or any such Guarantor shall consent to the appointment of a receiver, trustee or liquidator of Itself or a substantial part of Its assets, or (f) there shall be filed by or against Lessee or any such Guarantor a petition in bankruptcy, or (g) Lessee's articles of incorporation or other formation documents shall be amended to change Lessee's name or state of incorporation or formation, or (h) Lessee's legal existence in its state of incorporation or formation shall have lapsed or terminated or Lessee shall otherwise dissolve or liquidate Its assets, Upon default, Lessor may do any one or more of the following: (1) recover from Lessee the sum of (A) any and all Rentals, late charges and other amounts then in each case due and owing under any or all Leases, (b) accelerate and collect the unpaid balance of the remaining Rentals scheduled to be paid under any or all Leases, together with Lessor's anticipated residual interest in any or all of

Equipment subject thereto, both discounted to present value at a rate of 5.50% per annum, and (c) Lessor's retained attorneys' fee, collection cost and expenses: (2) enter upon Lessee's promises and take possession of any or all of such Equipment: (3) terminate any or all Leases; and/or (4) utilize any other right or remedy provide by applicable law. Lessee shall also pay to Lessor interest on its unpaid sum due hereunder from the due date thereof until paid in full at a rate per annum equal to the lower of 1-1/2% per month or the highest rate of interest permitted by applicable law. Lessee waives any rights that Lessee may have to require Lessor to sell or otherwise dispose of any Equipment.

16. Miscellaneous. Lessee may not assign any Schedule or any of its rights or obligations thereunder without the parties' written consent. Lessor may, by written notice to Lessee amend this Master Lease Agreement as amended shall be effective with respect to all Schedules. Leases shall be binding on Lessee's successors and permitted assigns and shall inure to the benefit of Lessor and its successors and Assignees. This Master Lease Agreement and each Lease shall be deemed enter into and performed in Salt Lake County, Utah. EACH LEASE SHALL BE GOVERNED BY THE LAWS OF UTAH, WITHOUT REGARD TO ITS PRINCIPLES OF CONFLICTS OF LAW OR CHOICE OF LAW. LESSEE HEREBY CONSENTS TO THE EXCLUSIVE JURISDICTION AND VENUE OF THE FEDERAL AND STATE COURTS LOCATED IN SALT LAKE COUNTRY, UTAH, IN ANY ACTION OR PROCEEDING RELATING TO ANY LEASE OR EQUIPMENT, AND THE PARTIES WAIVE THE RIGHT TO A JURY TRIAL THEREIN. The parties intend each Lease to be true lease or a time-sale of goods (for which a cash price was offered to Lessee), and not a loan, and do not

intend to exceed any applicable usury laws. If for any reason a Lease is held to involve a loan of money, any amounts payable hereunder in excess of the applicable highest lawful rate of interest shall be deemed a prepayment of any principal amount hereunder and, if such principal is paid in full, such excess amounts shall be immediately returned to Lessee. The Lessee named below and all individuals whose names appear on the application expressly authorize consumer reporting agencies and other persons to furnish credit information to Lessor, separately or jointly with other creditors or lessors, for use in connection with this agreement. Lessors and joint users of such information are authorized to receive and exchange credit information and to update such information as appropriate during the term of this Agreement. Information about the undersigned may be used form marketing and administrative purposes and shared with Lessor's affiliates. The undersigned may direct Lessor not to disclose that information (except transaction and experience information) with Lessor's affiliates by witting to the Lessor name and address referenced above.

LESSEE HAS READ THIS MASTER LEASE AGREEMENT AND EACH SCHEDULE BEFORE SIGNING IT.
Lessee: William Stuart Anapoell, MD
Signature: s/
Date: 2/13/04